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Arch Reinsurance Ltd v Akay Holdings Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-9–03 OF 2016(W)
ZULKEFLI PCA, ZAINUN ALI, ABU SAMAH NORDIN, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
29 JANUARY 2018

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Arbitration — Stay of court proceedings — Application — Respondent applied for stay of proceedings pending arbitration — Whether right of chargee under National Land Code to foreclose security under charge could be stayed under s 10 of the Arbitration Act 2005 pending arbitration — Whether s 10 of the Arbitration Act 2005 applied to registered charge providing for own mechanism of enforcement under National Land Code — Whether default under registered charge entitled chargee to commence foreclosure proceedings could be made subject to arbitration proceedings — Arbitration Act 2005 s 10

D

E

Land Law — Charge — Order for sale — Respondent failed to remedy breach to appellant — Appellant applied for order for sale of security — Whether charge separate and distinct document — Whether attempt to take away or curtail rights of the chargee by way of private agreement contrary to public policy — National Land Code s 256

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The respondent was the issuer of secured senior non-convertible bonds ('the bonds') under the subscription agreement dated 16 May 2013. The appellant was an investor. The appellant had agreed to subscribe to the bonds issued by the respondent priced at US$6m according to the terms and conditions contained in the subscription agreement. The appellant's agreement to subscribe to the bonds was subject, among others, to the condition that the bonds shall be secured by a security, namely, a first legal charge under the National Land Code ('the NLC') over a mining lease under Mining Certificate No 482, Lot 2556, Mukim Gali, Daerah Raub, Pahang ('mining lease'). The original maturity date of the bonds was 23 May 2014. On 5 June 2013, the respondent, in compliance with the terms of the subscription agreement, executed a charge under the NLC over the mining lease in favour of the appellant as security for the performance of the respondent's obligations under the subscription agreement. The respondent failed to redeem the bonds from the appellant on the maturity date. At the respondent's request, the maturity date was extended from 23 May–22 August 2014. When the respondent failed to meet the deadline, the maturity date was further extended to 15 December 2014. The respondent unfortunately failed to redeem the bonds on the due

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A date, namely, 15 December 2014 and the appellant demanded that the respondent paid off the entire secured amount. No payment was made by the respondent. On 22 January 2015, the appellant issued a statutory notice in Form 16D under s 254 of the NLC requiring the respondent to remedy the breach failing which the appellant shall apply for an order of sale of the said B security. When the respondent failed to remedy the breach, the appellant filed an originating summons in the Kuala Lumpur High Court for an order of sale of the security by way of a public auction. The respondent reacted by filing an application (encl 3) pursuant to s 10 of the Arbitration Act 2005 for an order of stay of the appellant's originating summons, pending arbitration as provided C by cl 26.2 of the subscription agreement. The High Court dismissed the respondent's application for stay of the foreclosure proceedings with costs, holding that a registered charge under the NLC could not be subjected to a stay under s 10 of the Arbitration Act. The Court of Appeal reversed the decision of the High Court, holding that foreclosure proceedings could not take place D without first determining the breach under the subscription agreement. On 29 February 2016 the appellant obtained leave of this court to appeal against the decision of the Court of Appeal.

Held, allowing the appeal with costs; setting aside the order of the Court of E Appeal; and reinstating the order of the High Court:

(1) The charge under the NLC which was executed by the parties on 5 June 2013 was the very result of the mutual agreement between the parties. By cl 8.18 of the annexure to the charge, the respondent agreed that the charge shall be governed by and construed in accordance with the laws of F Malaysia and that the parties irrevocably and unconditionally submitted to the non-exclusive jurisdiction of the Malaysian courts, despite their agreement earlier that the dispute under the subscription agreement shall be settled by arbitration in Singapore and that the said agreement shall be governed by and construed in accordance with the laws of Singapore. The G provision in the charge which stated that the governing law in relation to the charge was the law of Malaysia and that the parties unconditionally agreed to submit to the non-exclusive jurisdiction of the Malaysian courts was not merely accidental or due to oversight. It was by their own choice (see paras 44 & 46–47). H

(2) The charge was a separate and distinct document by itself. It was not subordinated, as contended by learned counsel for the respondent, to the subscription agreement. It was executed after the subscription agreement. There was a clause in the subscription agreement, namely, I cl 19 which declared that the subscription agreement constituted the entire agreement between the parties and therefore the charge could not be construed as being subject to the subscription agreement. Although the subscription agreement contained provisions relating to the charge, the parties had agreed, as stated in condition 5.1.1 of the bonds that the

chargee could enforce the security in the event of default by the chargor. As such, the appellant, as chargee under the charge, was at commence foreclosure proceedings over the security pursuant to the NLC instead of first waiting for the dispute to be resolved by arbitration. The decision of the Court of Appeal that the three documents: the subscription agreement, the bonds conditions and the charge were contemporaneous documents and should be construed together and the respondent's contention that the documents were inextricably interlocked and must necessarily be viewed as a 'comprehensive whole', could not be sustained in view of the express provision of cl 19 of the subscription agreement. The allegation that the statutory notice of demand was premature, was also unfounded as the indicative term sheet had been superseded by the subscription agreement. The charge was a separate and distinct document (see paras 48–50).

(3) There was no provision in the subscription agreement and the bonds conditions that they agreed to have the dispute to be determined by arbitration first before the appellant could enforce the security under the charge. The right of a chargee under the NLC applied to all chargees. Any attempt to take away or curtail the rights of the chargee by way of a private agreement was contrary to public policy. Hence, the dispute triggered by the statutory notice of demand in Form 16D was not arbitrable under s 4(1) of the Arbitration Act 2005 (see paras 65–67).

[Bahasa Malaysia summary

Responden adalah pengeluar bon terjamin senior tidak boleh ditukar ('bon') di bawah perjanjian langganan bertarikh 16 Mei 2013. Perayu adalah seorang pelabur. Perayu telah bersetuju untuk melanggan bon yang dikeluarkan oleh responden berharga AS$6 juta mengikut terma dan syarat yang terkandung dalam perjanjian langganan. Perjanjian perayu untuk melanggan bon tersebut adalah antara lain, dengan syarat bahawa bon tersebut akan dijamin dengan jaminan, iaitu, pajakan pertama sah di bawah Kanun Tanah Negara ('KTN') atas pajakan perlombongan di bawah Sijil Perlombongan No 482, Lot 2556, Mukim Gali, Daerah Raub, Pahang ('pajakan perlombongan'). Tempoh matang asal bon tersebut adalah 23 Mei 2014. Pada 5 Jun 2013, responden, mengikut syarat-syarat perjanjian langganan, melaksanakan pajakan di bawah KTN ke atas pajakan perlombongan yang memihak kepada perayu sebagai jaminan untuk melaksanakan tanggungjawab responden di bawah perjanjian langganan. Responden gagal menebus bon daripada perayu pada tempoh matang. Atas permintaan responden, tempoh matang telah dilanjutkan dari 23 Mei–22 Ogos 2014. Apabila responden gagal memenuhi tarikh akhir, tempoh matang dilanjutkan lagi hingga 15 Disember 2014. Responden malangnya gagal menebus bon pada tarikh tamat tempoh, iaitu, 15 Disember 2014 dan perayu menuntut agar responden membayar jumlah keseluruhan yang dijamin. Tiada bayaran dibuat oleh responden. Pada 22 Januari 2015,

perayu mengeluarkan notis statutori dalam Borang 16D di bawah s 254 KTN yang menghendaki responden untuk membaiki kemungkiran, dan sekiranya gagal, perayu akan memohon untuk perintah jualan jaminan tersebut. Apabila responden gagal membaiki kemungkiran tersebut, perayu memfailkan saman pemula di Mahkamah Tinggi Kuala Lumpur untuk perintah jualan jaminan dengan cara lelongan awam. Responden membalas dengan memfailkan permohonan (lampiran 3) selaras dengan s 10 Akta Timbang Tara 2005 untuk perintah penggantungan saman pemula perayu, menunggu timbang tara sebagaimana yang diperuntukkan oleh klausa 26.2 perjanjian langganan. Mahkamah Tinggi menolak permohonan responden untuk menangguhkan prosiding penyitaan dengan kos, memutuskan bahawa satu pajakan berdaftar di bawah KTN tidak boleh dikenakan penangguhan di bawah s 10 Akta Timbang Tara. Mahkamah Rayuan membatalkan keputusan Mahkamah Tinggi, memutuskan bahawa prosiding penyitaan tidak dapat dilakukan tanpa terlebih dahulu menentukan pelanggaran di bawah perjanjian berlangganan. Pada 29 Februari 2016, perayu memperoleh kebenaran mahkamah ini untuk merayu terhadap keputusan Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Rayuan; dan mengembalikan semula perintah Mahkamah Tinggi:

(1) Pajakan di bawah KTN yang dilaksanakan oleh pihak-pihak pada 5 Jun 2013 adalah hasil daripada kesepakatan bersama antara pihak-pihak. Melalui klausa 8.18 lampiran kepada pajakan tersebut, responden bersetuju bahawa pajakan tersebut akan ditadbir oleh dan ditafsirkan mengikut undang-undang Malaysia dan bahawa pihak-pihak secara muktamad dan tanpa syarat tertakluk kepada bidang kuasa tidak eksklusif mahkamah Malaysia, walaupun perjanjian mereka sebelum ini bahawa pertikaian di bawah perjanjian langganan akan diselesaikan oleh timbang tara di Singapura dan perjanjian tersebut akan ditadbir dan ditafsirkan sesuai dengan undang-undang Singapura. Peruntukan dalam pajakan yang menyatakan bahawa undang-undang yang mentadbir berkaitan dengan pajakan tersebut adalah undang-undang Malaysia dan bahawa pihak-pihak tanpa syarat bersetuju untuk tertakluk kepada bidang kuasa tidak eksklusif mahkamah Malaysia adalah bukan semata-mata tidak sengaja atau kerana kesilapan. Ia adalah pilihan mereka sendiri (lihat perenggan 44 & 46–47).

(2) Pajakan tersebut adalah dokumen berasingan dan berbeza dengan sendirinya. Ia tidak tertakluk, seperti yang ditegaskan oleh peguam yang bijaksana untuk responden, terhadap perjanjian langganan. Ia telah dilaksanakan selepas perjanjian langganan. Terdapat klausa dalam perjanjian langganan, iaitu, klausa 19 yang mengisytiharkan bahawa perjanjian langganan merupakan keseluruhan perjanjian antara pihak-pihak dan oleh itu pajakan tersebut tidak dapat ditafsirkan sebagai tertakluk kepada perjanjian langganan. Walaupun perjanjian langganan

tersebut mengandungi peruntukan yang berkaitan dengan pajakan tersebut, pihak-pihak telah bersetuju, sebagaimana dinyatakan dalam syarat 5.1.1 bon bahawa pemegang gadaian boleh menguatkuasakan jaminan jika berlaku pelanggaran oleh penggadai. Oleh itu, perayu, sebagai pemegang gadaian di bawah pajakan tersebut, memulakan prosiding penyitaan di atas jaminan menurut KTN bukannya menunggu pertikaian tersebut untuk diselesaikan oleh timbang tara. Keputusan Mahkamah Rayuan bahawa ketiga-tiga dokumen: perjanjian langganan, syarat-syarat bon dan jaminan adalah dokumen-dokumen sedia ada dan harus ditafsirkan bersama-sama dan pandangan responden bahawa dokumen-dokumen tersebut adalah berkait rapat dan semestinya dianggap sebagai 'keseluruhan menyeluruh', tidak dapat dikekalkan memandangkan peruntukan ekspres klausa 19 perjanjian langganan. Dakwaan bahawa notis tuntutan statutori adalah pramatang, juga tidak berasas kerana lembaran terma indikatif telah digantikan oleh perjanjian langganan. Pajakan tersebut adalah dokumen berasingan dan berbeza (lihat perenggan 48–50).

(3) Tiada peruntukan dalam perjanjian langganan dan syarat-syarat bon bahawa mereka bersetuju untuk pertikaian tersebut ditentukan oleh timbang tara terlebih dahulu sebelum perayu boleh menguatkuasakan jaminan di bawah pajakan tersebut. Hak seorang pemegang gadaian di bawah KTN terpakai untuk semua gadaian. Apa-apa percubaan untuk mengambil atau menyekat hak-hak pemegang gadaian melalui perjanjian persendirian adalah bertentangan dengan dasar awam. Oleh itu, pertikaian yang dicetuskan oleh notis tuntutan statutori dalam Borang 16D tidak boleh ditimbang tara di bawah s 4(1) Akta Timbang Tara 2005 (lihat perenggan 65–67).]

Notes

For cases on application, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2185–2186.

For cases on order for sale, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2917–3094.

Cases referred to

A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd [1999] VSC 170, SC (refd)

Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd and another and other matters [2011] SGCA 20; [2011] 3 SLR 386, SC (refd)

Chiranjilal Shrilal Goenka v Jasjit Singh And Ors 1993 SCC (2) 507 (refd)

Co-operative Central Bank Ltd v Y&W Development Sdn Bhd [1997] 3 MLJ 373, CA (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Fiona Trust & Holding Corporation and others v Privalov and others [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20, CA (refd)
Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft [1999] 1 SLR 737; [1999] 1 SLR(R) 382, CA (refd)
Fulham Football Club (1987) Ltd v Richards and another [2012] 1 All ER 414; [2012] Ch 333, CA (refd)
Hayana Telecom Ltd v Sterlite Industries (India) Ltd AIR 1999 SC 2354 (refd)
Idris bin Haji Mohamed Amin v Ng Ah Siew [1935] 1 MLJ 257, CA (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd)
Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] SGCA 21; [2011] 3 SLR 414, CA (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (refd)
MBf Property Services Sdn Bhd & Anor v Balasubramaniam a/l K Arumugam [2000] 2 MLJ 267, CA (refd)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)
NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd [1986] 1 MLJ 44, FC (refd)
Natraj Studios Ltd v Navrang Studios AIR 1981 SC 537 (refd)
Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 2 All ER 463, HL (refd)
Oei Hong Leong v Goldman Sachs International [2014] SGHC 128; [2014] 3 SLR 1217, HC (refd)
PT Theiss Contractord Indonesia v PT Kaltim Prima Coal and another [2011] EWHC 1842 (Comm), QBD (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)
Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] SGCA 41; [2009] 4 SLR 732, CA (refd)
Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57, CA (refd)
Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2010] SGHC 31; [2010] 2 SLR 821, HC (refd)
United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87, PC (refd)
Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others [1999] 3 All ER 864, CA (refd)

Legislation referred to

Arbitration Act [SG] ss 6(2), 48(1)(b)(i)
Arbitration Act 1996 [UK]
Arbitration Act 2005 ss 4, 4(1), (2), 10, 39
Bankruptcy Act (Cap 20) [SG] ss 98, 99
Companies Act (Cap 50) [SG] s 329(1)
Companies Act 2006 [UK] s 994

International Arbitration Act [SG] s 11
National Land Code ss 254, 256, 340(2), Part XVI, Form 16D

Cyrus Das (S Bhuvanes with him) (Bhuvanes) for the appellant.
Cecil Abraham (Sunil Abraham and Elaine Alexander with him) (Cecil Abraham & Partners) for the respondent.

Abu Samah Nordin FCJ:

[1] The main issue between the parties in this appeal is whether the right of the chargee under the National Land Code ('the NLC') to foreclose the security under the charge can be stayed under s 10 of the Arbitration Act 2005 pending arbitration pursuant to an arbitration clause in an earlier agreement ('the underlying agreement') between the same parties.

[2] The underlying agreement in question is the subscription agreement dated 16 May 2013. The chargee is the appellant and the chargor is the respondent. The security under the charge is a mining lease under Mining Certificate No 482, Lot 2556, Mukim Gali, Daerah Raub, Pahang ('mining lease'). The charge was registered on 5 June 2013.

BACKGROUND FACTS

[3] The respondent is the issuer of secured senior non-convertible bonds ('the bonds') under the subscription agreement. The appellant is an investor. The appellant had agreed to subscribe to the bonds issued by the respondent priced at US$6m according to the terms and conditions contained in the subscription agreement. The bonds were issued in two tranches:

(a) bonds with an aggregate principal amount of US$1m; and

(b) bonds with an aggregate principal amount of US$5m.

[4] The appellant's agreement to subscribe to the bonds is subject, among others, to the condition that the bonds shall be secured by a security, namely, a first legal charge under the NLC over the said mining lease.

[5] The respondent proposed to utilise the proceeds from the issuance of the bonds for purposes of repayment of the UOB loan and exploration and development of the mining lease and other general corporate purposes.

[6] Clause 26.1 of the subscription agreement provides that the agreement shall be governed by, and construed in accordance with the laws of Singapore, without regard to principles of conflict of laws thereunder. Clause 26.2 states that resolution of any controversy, dispute or claim between the parties shall be

A by arbitration:

> 26.2. Resolution of any controversy, dispute or claim between the parties regarding or in connection with this Agreement (including the interpretation, performance, breach, termination or validity of this Agreement ... shall initially be resolved through friendly consultation in good faith with a view to achieving a resolution between the parties. If such friendly consultation fails to resolve the Dispute within ten Business Days from the commencement of such consultation any party may submit the Dispute for arbitration in accordance with this clause 26.

C **[7]** Clause 26.3 of the subscription agreement stipulates that any dispute between the parties shall be settled by arbitration in Singapore. It states:

> The Dispute shall be settled by arbitration in Singapore, in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force. There shall be three arbitrators. Each party to the Dispute shall appoint one arbitrator and the third arbitrator shall be jointly appointed by the parties and Chairman of the arbitration. The arbitration shall be conducted in the English language. If the arbitrator is not qualified to practice law in Singapore, the arbitration tribunal shall engage an expert qualified to practice law in Singapore, to provide advice on Singapore laws. The arbitral tribunal shall decide any Dispute submitted to arbitration strictly in accordance with the substantive laws of Singapore (without regard to principles of conflict of laws thereunder) and shall not apply any other substantive law.

[8] The terms and conditions of the issuance of the bonds are contained in Schedule 1 of the subscription agreement. Condition 3.2 of the bonds states that the holder of the bonds, upon registration, shall be the absolute owner for all purposes.

[9] The original maturity date of the bonds was 23 May 2014. Condition 3.1 of the bonds specifies that the respondent, as issuer of the bond, shall redeem the bonds by that date.

[10] Condition 8.2.5(d) of the bonds states that a default in the payment of the principal or premium in respect of the bonds occurs when there is non-payment on the due date. Upon default of such payment the bondholder is entitled, at its discretion, to enforce repayment of the bonds by taking such actions or proceedings against the issuer as it may think fit.

[11] Condition 18.1 of the bonds is similar to cl 26.1 of the subscription agreement. It states that the bonds are governed by and shall be construed in accordance with the laws of Singapore. Condition 18.2 of the bonds corresponds to cl 26.3 of the subscription agreement. It provides that 'resolution of any controversy, dispute or claim between the parties regarding or in connection with the bonds shall be settled by arbitration in Singapore in

accordance with the Arbitration Rules of Singapore International Arbitration Centre (SIAC)'. A

[12] On 5 June 2013 the respondent, in compliance with the terms of the subscription agreement, executed a charge under the NLC over the mining lease in favour of the appellant as security for the performance of the respondent's obligations under the subscription agreement. The importance of the security to the investor is highlighted in recital (c) of the annexure. It states that: B

> It is one of the conditions of the Subscription Agreement that the Chargor executes and delivers this Charge in favour of the Chargee as security for the payment and repayment of the Secured Amounts ... and upon the terms and conditions herein contained. C

[13] It is significant to note that cl 8.18 of the annexure to the charge stipulates that the charge shall be governed and construed in accordance with the laws of Malaysia and that and unconditionally submit to the non-exclusive jurisdiction of the Malaysian courts. This clause is in direct contradiction with cl 26.1 of the subscription agreement which states that the subscription agreement shall be governed by and construed in accordance with the laws of Singapore. D E

[14] The annexure to the charge also contains the following clauses which may have a bearing on the outcome of this appeal: F

(a) cl 2.1

> The chargor covenants with the chargee that it shall on demand by the chargee duly and punctually pay or discharge to the chargee the secured amount; and

(b) cl 8.15 G

> Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the chargor of any term, covenant, stipulation and/or undertaking herein provided ... the chargee shall thereafter have the right to exercise all or any of the remedies available including pursuing all remedies of sale or possession pursuant to the National Land Code and civil suit to recover all monies due and owing to the chargee. H

[15] The respondent failed to redeem the bonds from the appellant on the maturity date. At the respondent's request, the maturity date was extended from 23 May–22 August 2014 (first extension). When the respondent failed to meet the deadline, the maturity date was further extended to 15 December 2014 (second extension). The respondent unfortunately failed to redeem the bonds on the due date, namely, 15 December 2014. I

[16] On 15 December 2014 the appellant demanded that the respondent pay off the entire secured amount. No payment was made by the respondent.

[17] On 22 January 2015, the appellant issued a statutory notice in Form 16D under s 254 of the NLC requiring the respondent to remedy the breach failing which the appellant shall apply for an order of sale of the said security.

[18] When the respondent failed to remedy the breach, the appellant filed an originating summons in the Kuala Lumpur High Court for an order of sale of the security by way of a public auction.

[19] The respondent reacted by filing an application (encl 3) pursuant to s 10 of the Arbitration Act 2005 for an order of stay of the appellant's originating summons, pending arbitration as provided by cl 26.2 of the subscription agreement. The respondent, in its supporting affidavit alleged that the appellant had reneged on its representation that it would be amenable to any extension from the maturity date of the bonds to allow the respondent space to negotiate the sale of the mining lease to a third party. The respondent blamed the appellant, claiming that the latter's unilateral and inequitable conduct in filing the foreclosure proceedings for the sale of the mining lease had frustrated the sale of the mining lease to a third party, thereby triggering the dispute between the parties. The agreed price for the sale to the potential buyer was RM70m. It was contended that the dispute must first be resolved by arbitration before the respondent could commence foreclosure proceedings.

[20] The High Court dismissed the respondent's application for stay of the foreclosure proceedings with costs, holding that a registered charge under the NLC could not be subject to a stay under s 10 of the Arbitration Act:

> It is trite that foreclosure proceedings under the provisions of the NLC are statutory in nature and such proceedings in rem are separate and distinct from a claim in personam that may arise contractually from the same subject matter. Thus, the outcome of an action in personam is wholly irrelevant and has no effect on foreclosure proceedings commenced based on the Charge. See *Malayan Banking Berhad v Skycon Development Sdn Bhd* [2014] MLJU 698; [2014] 1 LNS 429. In personam claims are invariably treated as independent of an *in rem* claim and such in personam claims are to be dealt with in separate proceedings independent of an order for sale proceedings under the NLC. In the circumstance, the determination of a contractual breach of the Subscription Agreement or the Bonds Conditions, by way of an arbitral reference, is not a prerequisite for the Plaintiff to enforce the Charge.

[21] The Court of Appeal reversed the decision of the High Court, holding that foreclosure proceedings could not take place without first determining the

breach under the subscription agreement. At para 27 of its judgment, the Court of Appeal held:

> The upshot of it all was simply that the subject matter of dispute in the charge was the very subject matter in dispute in the subscription agreement and bond conditions. That being the case and since there is no arbitral finding that there has been a breach of the subscription agreement and bonding conditions by the appellant, any action pursuant the charge is premature. With respect to the learned judge, to say that the respondent was exercising its right in rem was in fact 'putting the cart before the horse' so to speak. The Respondent can only possess that right in 'rem'. When the appellant had been found by an arbitral tribunal to be in breach of the subscription agreement and bond conditions. The learned judge fell into error, with respect, when he did not treat the interlocking nature of the three documents. Had he done so, we were sure he would have come to a conclusion as we had.

[22] On 29 February 2016 the appellant obtained leave of this court to appeal against the decision of the Court of Appeal on the following questions of laws:

(a) whether s 10 of the Arbitration Act 2005 applies to a registered charge providing for its own mechanism of enforcement under the National Land Code ('the NLC')? (question (1));

(b) whether default under a registered charge entitling the chargee to commence foreclosure proceedings can be made subject to arbitration proceedings? (question (2));

(c) whether the dispute on liability said to arise from the agreements, namely, the subscription agreement, the bond conditions and the charge must be determined as a prior issue under the arbitration clauses contained in the subscription agreement and bond conditions before a registered chargee is entitled to commence foreclosure proceedings under the NLC notwithstanding the terms of the charge agreement which is subject to a Malaysian court dispute resolution clause? (question (3));

(d) what is the legal effect where a charge agreement entered into by parties subsequently, which is separate, contains a different and conflicting dispute resolution clause and governing law clause from the earlier underlying agreement? (question (4)); and

(e) whether a chargee must prove the amount due and owing by the chargor under an underlying agreements, namely, the subscription agreement and the bond conditions, which are subject to Singapore law and arbitration clauses before commencing an order for sale proceedings under the NLC notwithstanding the term of the charge agreement which is subject to a Malaysian court dispute resolution clause? (question (5)).

A SUBMISSIONS OF PARTIES

[23] The gist of the appellant's submission is that the subject matter of the foreclosure proceedings under the NLC is not arbitrable in private arbitration proceedings and further cannot be subject to determination by a foreign law. Accordingly s 10 of the Arbitration Act would not apply to stay foreclosure proceedings under the NLC.

[24] Learned counsel for the appellant cited several cases on what matters are not arbitrable in support of his contention that the subject matter of the foreclosure proceedings is not arbitrable under s 4 of the Arbitration Act: See *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21; [2011] 3 SLR 414, *Fulham Football Club (1987) Ltd v Richards and another* [2012] 1 All ER 414; [2012] Ch 333, *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57, *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417. Generally, it was contended by the appellant that where the subject matter of the dispute is intended by the legislation for the exclusive jurisdiction of the courts or it is against public policy, it is not suitable for arbitration.

[25] Thus in cases like *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*, *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737; [1999] 1 SLR(R) 382, *Hayana Telecom Ltd v Sterlite Industries (India) Ltd* AIR 1999 SC 2354, *Chiranjilal Shrilal Goenka v Jasjit Singh And Ors* 1993 SCC (2) 507, *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, *Natraj Studios Ltd v Navrang Studios* AIR 1981 SC 537, the subject matter of the disputes was not suitable for arbitration.

[26] It was submitted that the subject matter of foreclosure proceedings under the NLC is not arbitrable as the Code, by itself, is a complete and comprehensive code of law governing the tenure of land in Malaysia: *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87. Any attempt to contract out of the rights and remedies under a statutory charge over land would be void as being contrary to public policy: *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. A registered charge is not a contract. It is a statutory instrument. Enforcement of the charge is the assertion of a statutory right: *Co-operative Central Bank Ltd v Y&W Development Sdn Bhd* [1997] 3 MLJ 373.

[27] It was submitted that the Court of Appeal failed to appreciate that the charge falls to be determined by Malaysian law whilst the dispute under the subscription agreement is governed by Singapore law.

[28] Where, as in this appeal, the charge, being subsequent to the subscription agreement, and does not contain an arbitration clause, it has to be assumed that arbitration was waived in respect of a dispute under the subsequent agreement: *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SGHC 31; [2010] 2 SLR 821.

[29] It was the respondent's submission that the questions of law posed to this court could be distilled into two core issues:

(a) the first issue is the arbitrability of disputes which concerns the right of a chargee to enforce a registered charge pursuant to the provisions of the NLC ('the Code'), ie whether a dispute as to an alleged default under a charge agreement is arbitrable? ('the arbitrability issue'); and

(b) the second issue is the construction of arbitration clauses contained in interlocking clauses, ie whether the plaintiff's originating summons falls within the ambit or scope of the arbitration clause (arbitration clause reference) ('the scope of the arbitration agreement issue').

[30] The first core issue relates to the arbitrability issue. It covers the first and second questions of law. It was submitted that the first question of law was a non-starter as the foreclosure proceedings were premature and/or an abuse of process, given that the underlying dispute between the parties has not been adjudicated in arbitration proceedings in Singapore.

[31] The second question of law is hypothetical and academic because the alleged default has not arisen since there is an underlying dispute between the parties under the subscription agreement and the bonds conditions. Further, the appellant's demand in Form 16D was invalid and premature as the appellant had represented to the respondent its agreement to extend the maturity date for two years beginning from the closing date. The appellant's representation can be seen from the contents in the indicative term sheet signed by the parties on 13 March 2013.

[32] The two-year period which would expire on 16 May 2015 would allow sufficient time for the respondent to develop and improve the mining lease with a view to selling it in the future but the appellant reneged on its agreement. The respondent had in fact identified the potential buyer. The appellant however denied making the said representation. The respondent claimed that the dispute between the parties was due to the unilateral conduct of the appellant in frustrating and/or preventing the sale of the mining lease, which was further aggravated by the appellant's action in issuing prematurely the statutory notice in Form 16D dated 22 January 2015 before the expiry of the extended maturity date. The respondent had strongly denied the allegations of breach of contract in the statutory notice of demand.

[33] As to the issue of arbitrability, the respondent's stand is that the dispute relating to the enforcement of the security under the charge is arbitrable under s 4(2) of the Arbitration Act. The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not by itself, indicate that a dispute about that matter is not capable of determination by arbitration. The respondent referred to us the decision of Singapore Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* which held that there is ordinarily a presumption of arbitrability whenever a dispute falls within the scope of an arbitration clause.

[34] In *Fulham Football Club (1987) Ltd v Richards and another* it was held that in the absence of any express provision in the English Arbitration Act 1996 and the English Companies Act 2006 excluding unfair prejudice disputes from arbitration, then the subject matter of the dispute must be presumed to be arbitrable.

[35] With regard to the second core issue, it was submitted that the dispute on the liability of the respondent was within the scope of the arbitration clause in the subscription agreement and this must be determined first before a registered chargee is entitled to commence foreclosure proceedings under the NLC.

[36] In *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] SGCA 41; [2009] 4 SLR 732, the Singapore Court of Appeal at pp 766–767 held:

> (c) In line with the prevailing philosophy of judicial non intervention in arbitration, the court will interpret the word 'dispute' broadly (see [28], [29], [33] and [34] above), and will readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable (see [56] and [59] above). The court should not be astute in searching for an admission of a claim, and would ordinarily be inclined to find that a claim is not admitted in all but the clearest of cases (see above).
>
> (d) *There is undoubtedly a 'dispute' referable to arbitration if the defendant expressly asserts that he denies the claim* (see [49] above).
>
> (e) The court *will not assess the merits of a denial/defence or the genuineness of a 'dispute'* since these matters *should properly be left to the arbitrator to assess* (in accordance with the parties' contractual bargain to arbitrate) (see [40] and [49] above).
>
> (f) Apart from an express denial or rejection of the claim, the court can also infer that the claim is not admitted from the previous inconclusive discussions between parties, prevarication or even silence (see [61] above). (Emphasis added.)

[37] It was submitted that for the purposes of determining whether a dispute

exists between the parties, the three agreements: subscription agreement, the bonds conditions and the charge which are inextricably interlinked and interlocked should be construed as a 'comprehensive whole'. All agreements which form part of the same transaction must be read together and cannot be considered in isolation of each other. Hence the charge is not a stand-alone agreement that can be read separately and distinctly from the subscription agreement and the bonds conditions: see *MBf Property Services Sdn Bhd & Anor v Balasubramaniam a/l K Arumugam* [2000] 2 MLJ 267, *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464, *Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] 1 MLJ 257, *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165, *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20.

DECISION

[38] The starting point in addressing the questions of law posed to us is the subscription agreement itself (including the bonds conditions), in particular the arbitration clause. It is, in the final analysis, essentially a matter of construction of the arbitration clause in particular and the subscription agreement and the bonds conditions in general. See for example: *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SGHC 31; [2010] 2 SLR 821. An arbitration clause in an international commercial contract should be liberally construed: see *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20. The agreement defines the rights and obligations of the contracting parties. It describes the appellant as an investor. The recital to the subscription agreement, namely recital (c), states that the obligations of the appellant under the agreement will be secured by the security. The 'security', as defined in cl 1.1 of the agreement means the 'first legal charge as defined under the National Land Code ... over the mining lease granted by the issuer in favour of the investor'.

[39] The relationship between the appellant and the respondent is therefore an 'investor and issuer' relationship. This is evident from the terms and conditions of the subscription agreement. It is obvious from the subscription agreement that, as an investor, the appellant would not have subscribed to the US$6m bonds without any form of security to protect itself against the risks in the investment. The issuer of the bonds reciprocated by agreeing to charge the mining lease as security in accordance with the NLC in favour of the appellant. The importance of the security to the investor is embedded in cl 2.4 of the subscription agreement:

> The Bonds, including accrued but unpaid interest and expenses, shall be secured by the Security.

A **[40]** The issuer's obligations to provide the security for the bonds are reiterated in condition 5.1 of the bonds:

> The payment obligations and the performance of all the obligations of the issuer under the Bonds, are secured by a first legal charge as defined under the National Land Code ... over the mining lease granted by the issuer in favour of the Bondholder.

B

[41] What happens if the issuer defaults in its obligation? The remedy open to the bondholder is provided for in condition 5.1.1 of the bonds:

C

> 5.1.1. Upon the occurrence of an Event of Default or any other event where the security becomes enforceable under any transaction document, the Bondholder may, in accordance with the terms and conditions of the Security Document, enforce the security ...

D

[42] 'Event of default' is defined in condition 8.2.5(d) of the bonds as follows:

> (d) Event of Default occurs when:
>
> E (i) Non-payment: there is a default in the payment of any principal or premium in respect of the Bonds on the due date for such payment, or there is a default in the payment of any interest of the Bonds within (5) days after the due date for such payment.

F **[43]** The maturity date for the respondent to redeem the bonds was initially 23 May 2014. It was extended by consent twice, the final date being 15 December 2014.

[44] Thus, it cannot be disputed that the charge under the NLC which was G executed by the parties on 5 June 2013 was the very result of the mutual agreement between the parties. A charge under the NLC provides for a separate mechanism of enforcement in the event of default of payment. The obligations of the chargor to make payment on the due date are stated in the charge. Clause 2.1 of the annexure to the charge states that the chargor covenants with H the chargee that it shall on demand by the chargee duly and punctually pay or discharge to the chargee the secured amounts in accordance with the provisions of the transaction documents.

[45] Clause 6.1 of the annexure to the charge spells out the rights of the I chargee. It entitles the chargee to issue a statutory notice under the NLC to remedy the breach if the chargor fails to redeem all or any of the bonds in accordance with the bonds conditions. If the chargor fails to remedy the breach specified therein, the charge shall become immediately enforceable and the chargee may apply for an order for the sale of the security pursuant to the

provisions of the NLC. For convenience cl 6.1 of the annexure to the charge is reproduced below:

> 6.1. Statutory Notice:
>
> (i) In the event of any breach by the Chargor of the covenant to pay under clause 2.1 and such breach occurring and continuing for a period of seven (7) days, it shall be lawful for the Chargee forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the breach within a period of thirty (30) days from the date on which such statutory notice is served or deemed to be served under the provisions hereof;
>
> (ii) If an Event of Default and/or Early Redemption Event occurs and the Chargor fails to redeem all or any of the Bonds in accordance with the Conditions, it shall be lawful for the Chargee forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said breach within a period of thirty (30) days from the date of such statutory notice.

Service of such notice shall be effected in the same manner as provided in cl 8.14 hereof. If at the expiry of the period specified in such notice as aforesaid the chargor fails to remedy the breach specified therein, the charge shall become immediately enforceable and the chargee may apply for an order for the sale of the said property pursuant to the provisions of the National Land Code.

[46] By cl 8.18 of the annexure to the charge, the respondent agreed that the charge shall be governed by and construed in accordance with the laws of Malaysia and that the parties irrevocably and unconditionally submit to the non-exclusive jurisdiction of the Malaysian courts, despite their agreement earlier that the dispute under the subscription agreement shall be settled by arbitration in Singapore and that the said agreement shall be governed by and construed in accordance with the laws of Singapore.

[47] The provision in the charge which states that the governing law in relation to the charge is the law of Malaysia and that the parties unconditionally agree to submit to the non-exclusive jurisdiction of the Malaysian courts is not merely accidental or due to oversight. It was by their own choice. Under the NLC, the power to make an order for sale of the said security by public auction is vested with the court: see s 256 of the NLC. It is for the court, and not the arbitrator, to decide whether there is a breach of the terms of the charge. The respondent is at liberty to contest the foreclosure proceedings at the hearing in the High Court. Unlike the subscription agreement, the charge does not contain any arbitration clause akin to cl 26.2 of the subscription agreement, for settlement of dispute between the parties. The jurisdiction of the arbitrator under the subscription agreement is limited by the terms of the arbitration

clause, namely cl 26.2. It does not extend beyond the terms of the arbitration agreement.

[48] In our judgment, the charge is a separate and distinct document by itself. It is not subordinated, as contended by learned counsel for the respondent, to the subscription agreement. It was executed after the subscription agreement. There is a clause in the subscription agreement, namely, cl 19 which declares that the subscription agreement constitutes the entire agreement between the parties and therefore the charge cannot be construed as being subject to the subscription agreement:

> 19. ENTIRE AGREEMENT
>
> 19.1. This Agreement constitutes the entire agreement between the Parties with respect to the transactions contemplated in this Agreement and supersedes all prior oral and written agreement, memoranda, understandings, undertakings, representations and warranties between the Parties relating-to the subject matter of-this Agreement.

[49] Although the subscription agreement contains provisions relating to the charge, the parties had agreed, as stated in condition 5.1.1 of the bonds that the chargee could enforce the security in the event of default by the chargor. That was clearly the intention of the parties. The dispute arose when the respondent disputed the statutory notice of demand to remedy the breach of the charge due to the respondent's default in redeeming the bonds on the maturity date. There was no allegation that the appellant did not make full payment of the bonds it had subscribed pursuant to the subscription agreement. The dispute falls squarely within the charge document. It is not uncommon in commercial transactions to split multi-faceted transactions into different agreements containing different dispute resolution provisions: see *PT Theiss Contractord Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm), *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd and another and other matters* [2011] SGCA 20; [2011] 3 SLR 386, *Oei Hong Leong v Goldman Sachs International* [2014] SGHC 128; [2014] 3 SLR 1217, *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SGHC 31; [2010] 2 SLR 821. As such, the appellant, as chargee under the charge, is at commence foreclosure proceedings over the security pursuant to the NLC instead of first waiting for the dispute to be resolved by arbitration.

[50] The decision of the Court of Appeal that the three documents: the subscription agreement, the bonds conditions and the charge are contemporaneous documents and should be construed together and the respondent's contention that the documents are inextricably interlocked and must necessarily be viewed as a 'comprehensive whole', could not be sustained in view of the express provision of cl 19 of the subscription agreement. The

allegation that the statutory notice of demand was premature, was also unfounded as the indicative term sheet had been superseded by the subscription agreement. The charge is a separate and distinct document.

ARBITRABILITY ISSUE

[51] We have expressed the view that the charge is a separate document which was executed after the subscription agreement (inclusive of the bond conditions). It is not subordinated to the subscription agreement. It was mutually agreed by the parties to the subscription agreement that the bonds would be secured by a charge in accordance with the NLC over the mining lease and that the appellant could foreclose on the security in the event of default by the respondent in redeeming the bonds on the maturity date. The maturity date was fixed by consent of the parties.

[52] But in view of the differences of opinion between the parties on the arbitrability of the subject matter of the charge, we deem it necessary to deliberate on the issue.

[53] The relevant provisions on the issue of arbitrability are ss 4, 10 and 39 of the Arbitration Act 2005. Section 4 states:

> 4(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any Court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about the matter is not capable of determination by arbitration.

[54] It is now mandatory for the court to stay the proceedings in respect of a matter which is the subject matter of an arbitration agreement where a party makes an application under s 10 of the Arbitration Act 2005, before taking any other steps in the proceedings, and refer the parties to arbitration unless it finds that the agreement is *null and void, inoperative or incapable of being performed*. (Emphasis added.) A fairly recent decision on s 10 of the Act is *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*. But the issue of arbitrability under s 4 of the Act was not raised in that case.

[55] Section 39 of the Act refers to grounds for which the court may refuse recognition or enforcement of an award. It is not relevant to the instant appeal.

[56] The appellant's position is that the subject matter of the charge is not arbitrable by virtue of s 4(1) of the Act. The respondent contended that it is

arbitrable under s 4(2) of the Act. Both parties had also referred to us expert legal opinions of senior practitioners from Singapore if a similar situation arose in Singapore in accordance with the laws of Singapore. There is no consensus of opinion even among the experts. The expert opinion on behalf of the appellant was that the dispute arose out of the charge document, when the respondent disputed the statutory notice of demand. The expert opinion on behalf of the respondent was that the dispute arose out of the subscription agreement and was within the scope of the arbitration clause. The mere denial of breach of the agreement is sufficient to constitute a 'dispute'.

[57] We were informed that there are no decided cases on the issue of arbitrability under s 4 of the Arbitration Act 2005. Both sides had to rely on several decisions in foreign jurisdictions on this issue in support of their respective contentions. The following are some of the cases referred to us.

[58] In *Larsen Oil & Gas Pte Ltd v Petroprod Ltd* the Singapore Court of Appeal held that arbitrability was an important factor which ought to be taken into consideration when determining whether to grant a stay under s 6(2) of the Singapore Arbitration Act. It would be a waste of time to proceed by way of arbitration if the subject matter was not arbitrable as the arbitral award would be liable to be set aside under s 48(1)(b)(i) of the Singapore Arbitration Act.

[59] In that case the respondent, Petroprod Ltd and its four subsidiaries entered into a management agreement with the appellant, Larsen Oil and Gas Pte Ltd, wherein the latter would provide management services to the former. Petroprod Ltd, a company incorporated in Cayman Islands, was subsequently placed in compulsory liquidation in Singapore. Prior to that, Petroprod Ltd and its subsidiaries had made certain payments to Larsen Oil and Gas Pte Ltd. The payments were made within two years of its insolvency. The law presumed that such payments were made with an intention to prefer Larsen Oil and Gas Pte Ltd as a creditor. The liquidators of Petroprod Ltd in Singapore commenced action to avoid certain payments made by Petroprod Ltd and its four subsidiaries to Larsen Oil and Gas Pte Ltd on the grounds that:

(a) payments by Petroprod Ltd amounted to unfair preference under ss 98 and 99 of the Bankruptcy Act (Cap 20) read with s 329(1) of the Companies Act (Cap 50); and

(b) payments by the four subsidiaries to Larsen Oil and Gas Pte Ltd were made with intent to defraud it as a creditor of the subsidiaries.

Larsen Oil and Gas Pte Ltd applied for a stay of the action pending arbitration pursuant to an arbitration clause in the management agreement. The High Court dismissed it on the grounds, inter alia, that the issues were not arbitrable. Larsen Oil and Gas Pte Ltd appealed to the Court of Appeal. The Court of

Appeal dismissed it and affirmed the decision of the High Court, holding that the courts should treat disputes arising from the operation of statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.

[60] Larsen Oil & Gas Pte Ltd was considered in *Fulham Football Club Ltd v Richards and another*. The English Court of Appeal held that the issue of arbitrability could be raised as a ground in challenging an application for stay of proceeding under the English Arbitration Act 1996. In that case the petitioner, Fulham Football Club Ltd, filed a petition under s 994 of the Companies Act 2006 against the Football Association Premier League Ltd ('FAPL') complaining of unfair prejudice. The complaint was directed against its chairman's involvement in facilitating the transfer of Mr Crouch from Portsmouth to Tottenham. Fulham alleged that it is an implied term of the FAPL rules that members of the board of FAPL will comply with their fiduciary obligations and not act so as to prefer the interests of one member club over another. FAPL and its chairman applied for a stay of the proceedings pending arbitration. Vos J granted the stay. It was affirmed by the Court of Appeal, holding that a claim alleging unfair prejudice did not involve the making of a winding up order. At para 92 of its judgment Patten CJ said:

> if ... there is no statutory restriction or rule of public policy which prevents the parties from agreeing to submit such disputes to arbitration it is not possible to read into the language of arbitration clause the limitation contended for.

[61] In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57, the Singapore Court of Appeal, in dealing with s 11 of the Singapore International Arbitration Act, held that there will ordinarily be a presumption of arbitrability so long as the dispute falls within the scope of an arbitration clause but it can be rebutted where:

(a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the Legislative history of the statute in question); or

(b) it would be contrary to the public policy considerations involved in that type of dispute to permit to be resolved by arbitration.

[62] In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*, the above conditions were satisfied. Similarly, in *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737; [1999] 1 SLR(R) 382 and in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 the courts held that reliefs in the form of winding-up orders were not arbitrable.

[63] Under s 4(1) of the Arbitration Act 2005 a dispute which the parties agree to submit to arbitration is not arbitrable on ground of public policy.

A There is no universally accepted test on what is public policy. Different courts and different tribunals might have different views as to enforceability of contracts on ground of public policy: See *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 3 All ER 864.

B **[64]** *Russel on Arbitration* (24th Ed) at p 71 para 2 makes the following observation:

> Limits on arbitrability. There is no agreed definition of arbitrability and none is provided in the Arbitration Act 1996, although the Act does recognise the right of
C the court to refuse recognition or enforcement of an award that is in respect of a matter which is not capable of settlement by arbitration. There are also well recognised categories of dispute that may not be capable of being resolved by arbitration and certain underlying principles that can be identified in determining whether a matter is arbitrable. In particular, a dispute will generally not be arbitrable
D if it involves an issue of public policy, public rights or the interests of third parties, or where the dispute in question is clearly covered by a statutory provision which provides for inalienable access to the courts. In these cases, as the Court of Appeal has confirmed, 'even the most widely drafted arbitration agreement will have to yield'.

E **[65]** In the instant appeal before us, there was a clear intention of the parties as manifested by the subscription agreement and the bonds conditions that the appellant could enforce the security under the charge in the event of default by the respondent. There is no provision in the subscription agreement and the
F bonds conditions that they agree to have the dispute to be determined by arbitration first before the appellant could enforce the security under the charge.

[66] A registered chargee under the NLC acquires an indefeasible title to the
G charged security: *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1986] 1 MLJ 44; *Co-operative Central Bank Ltd v Y&W Development Sdn Bhd* [1997] 3 MLJ 373. Under s 340(2) of the NLC the title or interest of the chargee shall not be indefeasible only in the three circumstances specified therein. Section 256 of the NLC confers a right on the chargee to apply for an
H order for sale of the charged security to recover the sum secured by the charge when the chargor fails to comply with the notice of demand in Form 16D. On any such application, the court shall order the sale of the charged security unless it is satisfied of the existence of cause to the contrary: *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. The statutory right of the chargee to
I indefeasible title and to sell the charged security in the event of default by the chargor cannot be taken away by private agreement between them. The right of a chargee under the NLC applies to all chargees. Any attempt to take away or curtail the rights of the chargee by way of a private agreement is, in our view, contrary to public policy.

[67] The NLC is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidence of it as well as other important matters affecting land: *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87. In *Kimlin Housing Development Sdn Bhd v Bank Bumiputera (M) Bhd*, it was held that the provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI are exhaustive and exclusive and any attempt at contracting out of those rights unless expressly provided for in the Code — would be void as being contrary to public policy. Hence, the dispute triggered by the statutory notice of demand in Form 16D is not arbitrable under s 4(1) of the Arbitration Act 2005.

[68] Finally, it is time for us to address the questions posed to us. Our answers to the questions posed to us are as follows:

(a) the answers to questions (1), (2) and (3) are in the negative; and

(b) the answers to questions (1), (2) and (3) are sufficient to determine the outcome of the appeal without the need to answer questions (4) and (5).

[69] For the reasons as aforesaid, the appeal is allowed with costs, the order of the Court of Appeal is set aside and the order of the High Court is reinstated.

Appeal allowed with costs; decision of Court of Appeal set aside; and order of High Court reinstated.

Reported by Ahmad Ismail Illman Mohd Razali